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MARYLAND

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 206

LUIGI MASCITTI,

Appellant,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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Stack v. Boyle (No. 400, October Term, 1951), 20 L.W. 4004	39
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Yick Wo v. *Hopkins*, 118 U. S. 356 10

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Alien and Sedition Act, 1 Stat. 570 6
Alien Registration Act of 1940, Sections 20-23; 54 Stat. 670-673; 8 U.S.C. 137 . . . . . 2, 15

Constitution of the United States:

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United States Code: 28 U.S.C. 1253, 2101(b), 2282 2

MISCELLANEOUS

	Page
Aiyar, The Law Lexicon of British India	19
Bacon, Elements of the Common Law	19
Bell, South African Legal Dictionary	19
Black's Law Dictionary	19
Borchard, Diplomatic Protection of Citizens Abroad, pp. 50, 51	7, 9
Bouvier, Law Dictionary	19
Burdick, The Law of the American Constitution, 449	26
Byrnes, Law Dictionary	19
California Law Review, Volume 15, p. 269	22
Chafee, Free Speech in the United States, pp. 445, 481	15, 16, 30
Congressional Record, Volume 84, p. 10370; Volume 86, p. 9032; Temporary Edition, January 2, 1951, pp. 17285 *et seq.*	15, 16
Cooley's Blackstone, 4th Ed., Volume 1, pp. 682, 701, 726	19
Cooley's Constitutional Limitations (Eighth Ed.), Volume 1, 544-545	26
Corwin, John Marshall and the Constitution, p. 150	21
Dodd, Modern Constitutions, Volume I, p. 153; Volume II, pp. 42, 141, 175	19
Foreign Relations, Volume II (1895), p. 775	8
Frazer, Control of Aliens in the British Commonwealth of Nations, p. 134	9
Funk and Wagnalls, New Standard Dictionary	19
Hackworth, International Law, Volume III, pp. 690, 691	8
House Document 708, 81st Congress, 2d Session, pp. 9, 10	17, 39
House Report 2683, 76th Congress, 3d Session	15
Hyde, International Law, Volume I, pp. 101, 104	6, 7
Konvitz, The Alien and the Asiatic in American Law, pp. 44-55	6
Michigan Law Review, Volume 20, p. 315	22
Moore, International Law Digest, Volume IV, p. 97	9
Oppenheim's International Law (Lauterpacht, Fifth Ed.), Volume I, pp. 551, 552	7, 9

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Osborn, A Concise Law Dictionary for Students and Practitioners 19
Oxford, Universal English Dictionary 19
Rottsschaefer, American Constitutional Law, pp. 769, 770 26
Senate Report 1796, 76th Congress, 3rd Session 15
Sheppard's Touchstone, Volume 1, pp. 62, 70, 73 19
Story, On the Constitution (5th Ed.), pp. 218, 219 20
Walker, Science of International Law, p. 214 9
Websters, New International Dictionary 19
Wharton, International Law, Volume 2, p. 482 8
Woolsey, International Law, p. 90 9
Yale Law Journal, Volume 52, pp. 108, 115-117 24

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

Opinion Below

On June 18, 1951, a three judge district court denied, without opinion, appellant's application for a preliminary injunction and dismissed the complaint herein. The basis for this decision, as recited in the court's order, was "that the Act of October 16, 1918, as amended by the Act of June 28, 1940, is constitutional" (R. 8).

Jurisdiction

Appellant's complaint seeks to declare invalid an order of deportation entered against him upon the ground that the

deportation statute (54 Stat. 673, 40 Stat. 1012, 41 Stat. 1008, 8 U. S. C. 137) as construed and applied to him is unconstitutional. He seeks a permanent injunction (R. 3, 4). An order allowing this appeal, entered on June 28, 1951 (R. 10) was filed in this Court on July 26, 1951 and probable jurisdiction was noted on October 8, 1951.

This appeal is taken pursuant to 28 U. S. C. 1253 and 2101(b): *American Communications Association* v. *Douds*, 339 U. S. 382.

Question Presented

May a legally resident alien who has been domiciled in the United States for more than thirty years, who is married and the father of an American born child, and whose loyalty to the United States for the past twenty years is unquestioned, be deported in 1950 pursuant to a deportation statute enacted in 1940 (Section 23b of the Alien Registration Act of 1940, 54 Stat. 673) because of membership in a subversive organization prior to 1929, and is this deportation statute, as construed and applied to the appellant, in conflict with the *ex post facto* provision of the Constitution, the First and Fifth Amendments?

The Statute

Prior to 1940, the Act of October 16, 1918 (8 U. S. C. 137) provided *inter alia* for the exclusion and deportation of aliens who were presently members of organizations advocating or distributing literature advocating the overthrow of the government by force and violence. *Kessler* v. *Strecker*, 307 U. S. 22.

Section 23(b) of the Alien Registration Act of 1940 (54 Stat. 673) amended Section 2 of the Act of October 16, 1918 (40 Stat. 1012, 41 Stat. 1008, 8 U. S. C. 137) to read as follows:

"Any alien who was at the time of entering the United States, *or has been at any time thereafter,* a member of any one of the classes of aliens enumerated in Section 1 of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in this subchapter. *The provisions of this section shall be applicable to the classes of aliens mentioned in this act, irrespective of the time of their entry into the United States.*" (Italics supplied.)

Statement

The facts alleged in appellant's complaint are substantially undisputed, are deemed admitted on appellee's motion to dismiss and are supported by the immigration file which was made a part of the record in the court below. (*Kroese* v. *General Castings Corp.*, 179 F. (2d) 760, cert. denied 339 U. S. 983). The complaint (R. 1) alleges that the appellant is a native of Italy and that he entered the United States for permanent residence in 1920 (when he was 16 years old) (Par. 2). In 1946 he was arrested in deportation proceedings and thereafter ordered deported because of membership in subversive organizations prior to 1929 (Par. 5-7). Appellant is married to a legally resident alien, has an American born citizen son and has been of good character and loyal to the United States since 1929 (Par. 7). His deportation is predicated solely upon past membership in a subversive organization which offense was made a ground of deportation in 1940 (Par. 9). Appellant never personally advocated overthrow of the Government, was not aware that the organizations of which he was a member did so, and he never participated in any activities of these subversive organizations which were in furtherance of governmental overthrow. In 1929, when he became aware of the character of the subversive organizations of which he was a member, he resigned and he has been a loyal

resident of the United States for more than 20 years (Par. 10-15).

The Board of Immigration Appeals, acting for the appellee, in its opinion, dated October 13, 1950, directing the deportation of appellant, declared (R. 15, 16):

> "Respondent is a 46-year-old, a native and citizen of Italy whose only entry into the United States was on September 11, 1920, at which time he was admitted for permanent residence.
>
> "Respondent lives with his wife, a legally resident alien, and his United States citizen son. The record established that respondent has been regularly employed, supports his family, and that they are dependent upon him. He is well thought of in his community and by his employers and is a good workman. Aside from the factors which give rise to this proceeding, respondent's record is excellent. He has no criminal record. An independent investigation conducted by the Immigration and Naturalization Service indicates that all persons interviewed had confidence in respondent's good character and loyalty to the United States and believed that he would be a good citizen . . .
>
> "Respondent has testified that he has no connections with the Communist Party since 1929. There is nothing in the record to show that he has been so connected."

The Board in finding that the appellant was subject to deportation, overruled appellant's contention that innocent membership in a subversive organization relieved him from such consequences. It concluded that the statute does not by its language apply only to knowing membership. By way of *dicta*, it concluded that mere membership alone, or attendance at meetings coupled with knowledge of the organization's literature was sufficient to conclusively establish knowing membership (R. 17).

The Board's order of deportation is attacked in this litigation in which appellant asserts the unconstitutionality of

the statute enacted in 1940 which in 1950 seeks to separate him, for conduct prior to 1929, from his family, home and the land to which he has been loyal for twenty years or more. As noted, *supra*, the court below denied his contentions that the statute as construed and applied to him, was unconstitutional, either on the grounds that it violated (a) the *ex post facto* provisions of the Constitution, (b) the First Amendment or (c) the due process clause of the Fifth Amendment.

ARGUMENT

Appellant contends that legally resident aliens are protected by the constitution in the same manner and to the same extent as citizens. The power of Congress to deport legally resident aliens is not unlimited but is subject to constitutional limitations. The *ex post facto* prohibition of the constitution applies to the deportation process because it forbids the enactment of civil laws which have for their sole purpose the imposition of a penalty for past conduct. The deportation of a legally resident alien, who has been loyal to the United States for twenty years, because of membership in a subversive organization prior to 1929 is an arbitrary and tyrannical exercise of the deportation authority of Congress and it offends the due process clause of the Fifth Amendment. Appellant never believed in the overthrow of the government by force or violence and his innocent associations over twenty years ago were protected by the First Amendment and therefore cannot form the basis for deportation in 1950. The application of the deportation statute to the appellant upon the facts of this case, therefore, is in violation of the *ex post facto* prohibition of the Constitution and the Fifth and First Amendments.

I.

Introduction

Before considering the constitutional limitations upon Congressional power to deport, we feel that we should first review the historical basis of the power to deport, the legal position of resident aliens, the history of deportation statutes in the United States prior to 1940 and the background of the Alien Registration Act of 1940.

(A)

The Power to Deport

The review of our deportation laws, *infra*, will disclose, that our early expulsion statutes developed as an incident of our exclusion laws. An excludable alien entered the United States surreptitiously or otherwise evaded our exclusion laws. Deportation was sought to prevent evasion of admission requirements. (*1 Hyde, International Law*, p. 104; *Konvitz, The Alien and the Asiatic in American Law*, p. 47.) We overlook the unpopular and short-lived Alien and Sedition Act of 1798, for no alien was ever deported under its provisions. (1 Stat. 570; *Konvitz, supra.*) Not until 1907, did we assert a limited right to deport a domiciled alien—and then only when he had less than three years residence and was found practicing prostitution (34 Stat. Pt. I, 899). It is, therefore, not surprising to note that the early deportation cases such as *Fong Yue Ting* v. *United States*, 149 U. S. 698 (1893) speak of the unqualified right of the government to deport in the same absolute terms as it did in exclusion cases, such as *Chae Chan Ping* v. *United States*, 130 U. S. 581; *Nishimura Ekiu* v. *United States*, 142 U. S. 651; and *Turner* v. *Williams*, 194 U. S. 279. The failure to distinguish between exclusion cases and deportation which, prior to 1907 was no more than delayed

exclusion, was understandable. The distinction between constitutional protection of resident aliens—and even those illegally in our midst—and those knocking at our gates has been noted recently by this court. *See: Wong Yang Sung* v. *McGrath,* 339 U. S. 33; *Knauff* v. *Shaughnessy,* 338 U. S. 537.

Whether Congressional power over immigration stems from the concept of sovereignty as known in international law *(Nishimura Ekiu* v. *United States, supra)* or the power to regulate commerce with foreign nations *(Turner* v. *Williams, supra),* the right to exclude aliens appears to be absolute and beyond the pale of constitutional prohibitions, because an alien seeking admission does not have the guarantees "obtaining in a land to which they do not belong as citizens or otherwise". *Turner* v. *Williams* and *Knauff* v. *Shaughnessy, supra.* The domiciled alien, however, both under international and domestic law, stands on a different plane as we shall see below.

Suffice it to observe here, that the concept of sovereignty in international law is not so absolute that limitations are not recognized upon the power to deport. "Expulsion may, however, savor of an abuse of power unless the decision to expel be founded on a *bona fide* belief as to the evil effect upon the State of the continued presence of the individual within its domain. * * * a decision to expel must not be one which no enlightened State could in good faith be reasonably expected to reach." *1 Hyde, International Law,* p. 101. It "has in practice become the rule that the government exercising the right of expulsion must upon demand furnish evidence that the action was based on *legitimate fear* that the public interests were in danger * * *" *Borchard, Diplomatic Protection of Citizens Abroad,* p. 51. (See, also: 1, *Oppenheim's International Law, Lauterpacht,*

Fifth Ed., pp. 551-552; 2, *Wharton, International Law*, p. 482.)

In our diplomatic relations with foreign nations, we have often asserted this limitation upon the power to deport. On January 30, 1896 Secretary of State Olney advised our Minister in Guatemala as follows (II Foreign Relations 1895, 775):

> "The modern theory and practice of Christian nations is believed to be founded on the principle that the expulsion of a foreigner is justifiable only when his presence is detrimental to the welfare of the State * * *".

Secretary of State Root advised our Minister in Caracas in 1907 as follows (III *Hackworth, International Law* 690):

> "The Government of the United States neither questions nor denies the existence of the sovereign right to expel an undesirable resident. It cannot be overlooked, however, that such a right is of a very high nature and that the justification must be great and convincing. Otherwise residence in a foreign country would be neither safe nor profitable, for expulsion might at any moment deprive a resident of the legitimate rewards of a lifetime. While, therefore, the existence of the right is not denied, its exercise must be limited. * * * The right of a government to protect its citizens in foreign parts against a harsh and unjustified expulsion must be regarded as a settled and fundamental principle of international law. It is no less settled that a government may demand satisfaction and indemnity for an expulsion in violation of the requirements of international law."

An opinion of the Solicitor for the Department of State on March 14, 1911 (III, *Hackworth, supra*, 691) once again reaffirmed this principle, stating:

> "* * * the right of expulsion is an attribute of sovereignty, but one which is justifiable only as an

extreme measure, when the presence of a foreigner is detrimental to the welfare of the State."

See also: IV *Moore, International Law Digest*, 97 *et. seq.*

We submit that the instant situation is one where there is no justification for concluding that the appellant's presence in the United States is detrimental to the welfare of the United States. The exact converse is the case. His unjustified expulsion, if permitted to stand, will constitute a violation of international law . . . the very source of the government's alleged power to deport him.

(B)

LEGAL POSITION OF RESIDENT ALIENS

From historic times, the legally resident or domiciled alien has received greater protection than other strangers in foreign lands. In Athens, domiciled aliens, known as *metoeci*, enjoyed privileges not known to others. *Woolsey, International Law* p. 90; *Walker, Science of International Law*, 214.

In peace time, Australia, noted for its arbitrary immigration laws, grants complete immunity from deportation to the alien who has three years of residence. *Frazer, Control of Aliens in the British Commonwealth of Nations*, p. 134. "In Belgium, Brazil and other states certain categories of aliens are exempt, particularly those who by residence or marriage have identified their interests with the state. . . . In Venezuela, and other Latin American countries expulsion is often limited by the law to transient aliens. . . . The rule is becoming general that domiciled aliens shall not be expelled even as a penalty for crime." *Borchard, Diplomatic Protection of Citizens Abroad*, p. 50.

The unfulfilled prophecy of I *Oppenheim's International Law, supra*, at 552, contains within it, a warning against the

tyrannical application which is sought to be made of our deportation laws in the instant case. He states:

> "With the gradual disappearance of despotic view in the different States and with the advance of true constitutionalism, guaranteeing individual liberty and freedom of opinion and speech, expulsion of aliens, especially for political reasons, will become less frequent."

In the United States, aliens who are legal residents are protected by the full scope of the constitution. In *Sung* v. *McGrath*, 339 U. S. 33, following the *Japanese Immigrant* case, 189 U. S. 86, it was held that deportation proceedings which violated the due process clause of the Constitution, were null and void. In *Yick Wo* v. *Hopkins*, 118 U. S. 356, it was held that the practice of unlawful discrimination against Chinese aliens in the grant of laundry licenses violated the Constitution, and in *Wong Wing* v. *U. S.*, 163 U. S. 228, it was decided that an immigration statute which inflicted punishment at hard labor without a judicial trial as a part of the deportation process was unconstitutional. Finally it has been held administratively, following a dictum in *Bilokumsky* v. *Tod*, 263 U. S. 149, that deportation may not constitutionally be predicated upon evidence unlawfully seized in violation of the Fourth Amendment of the Constitution.

One case, however, often relied upon by the government to sustain its power to deport, muddies the waters of constitutional guarantees for aliens . . . *Fong Yue Ting* v. *United States*, 149 U. S. 698. This case upheld the constitutionality of a statute which required the deportation of Chinese laborers unable to produce a certificate of residence *or establish lawful residence by at least one credible white witness.* The majority upheld the statute upon the broad power of Congress to admit and expel aliens. Justices Brewer, Field and Fuller recorded notable dissents.

Said, Justice Brewer:

"That those who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in it, has long been recognized by the law of nations. (p. 734) * * *

It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. * * * Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. * * * The expulsion of a race may be within the inherent powers of a despotism. (p. 737) * * *

I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens. * * * Now, the power to remove resident aliens is, confessedly not expressed. Even if it be among the powers implied, yet it can be exercised only in subordination to the limitations and restrictions imposed by the Constitution. (p. 738) * * *

If the use of the word 'person' in the Fourteenth Amendment protects all individuals lawfully within the State, the use of the same word, 'person' in the Fifth must be equally comprehensive and secures to all persons lawfully within the territory of the United States the protection named therein * * *" (p. 739).

Said, Justice Field:

"Is it possible that Congress can, at its pleasure, in disregard of the guarantees of the Constitution, expel at any time the Irish, German, French, and English who may have taken up their residence here on the invitation of the government, while we are at peace with the countries from which they came, simply on the ground that they have not been naturalized. * * * Arbitrary and despotic power can no more be exercised over them with reference to their persons and property than over the persons and property of native born citizens.

* * * Arbitrary and tyrannical power has no place in our system" (pp. 750, 754, 755).

Said, Chief Justice Fuller:

"No euphuism can disguise the character of the act in this regard. * * * It is, in effect, a legislative sentence of banishment and, as such, absolutely void."

See: discussion of case in *Konvitz, supra,* pp. 47-55.

We submit that the *Fong Yue Ting* case was incorrectly decided and that it does not represent the views of the Supreme Court today. It is in conflict with the *Japanese Immigrant* case and the *Sung* decision, *supra.* The views of the dissenting Justices in *Fong Yue Ting* should be approved and reaffirmed as the law of the land.

(C)

History of Our Deportation Laws

In 1862 Congress prohibited the importation of orientals under the systems which prevailed at the time and which was a form of slavery (12 Stat. 340). The Act of March 3, 1875, likewise pertained exclusively to the admission of aliens and it prohibited the importation of prostitutes and alien convicts (18 Stat. 477). In 1882 Congress provided for the exclusion of Chinese laborers (22 Stat. 58), lunatics, idiots and persons liable to become a public charge (22 Stat. 214). The law of 1885 prohibited the importation of contract labor (23 Stat. 332).

In 1891 the classes of inadmissible aliens were increased and for the first time, aliens *who entered in violation of law* were made subject to deportation for one year after arrival (26 Stat. 1084).

The Immigration Act of 1903 was primarily designed to codify existing law. However, it increased the limitation of time for the deportation of aliens who entered in viola-

tion of law to a period of three years after entry with the exception of public charges for whom the period was two years (32 Stat. Pt. 1, 1213, 1218).

The Immigration Act of 1907 (34 Stat. Pt. 1, 899-900) for the first time permitted the deportation of aliens who entered the United States lawfully. Any alien woman or girl "who shall be found an inmate of a house of prostitution or practicing prostitution at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported * * *." Present rather than past misconduct was the test of deportability under the deportation provisions of the Immigration Act of 1907. (See: Matter of P. — II Administrative Decisions under Immigration and Nationality Laws 659 et seq.)

Section 19 of the Immigration Act of February 5, 1917, (39 Stat. 889-890) provided for deportation within five years of entry of aliens who entered in violation of law. In addition the following aliens were made subject to deportation: 1. Aliens who shall be found within five years after entry in the United States in violation of law. 2. Any alien found advocating anarchy, unlawful destruction of property or overthrow of the government by force or violence. 3. Aliens who become a public charge within five years of entry from causes not affirmatively shown to have arisen subsequent to entry. 4. Aliens convicted and sentenced of crimes involving moral turpitude after the enactment of the statute. 5. Aliens who shall be found connected with prostitution or who shall import any person for the purpose of prostitution. For those who entered the United States lawfully, present misconduct was again the criteria for the determination of deportability under our basic immigration act, the 1917 statute, which is still in force today (8 U. S. C. 155).

By the Act of October 16, 1918 (40 Stat. 1012) as amended by the Act of June 5, 1920 (41 Stat. 1008) deportation was provided for those found to be members of certain subversive classes. As interpreted by the Supreme Court in *Kessler v. Strecker*, 307 U. S. 22, these provisions proscribed only present membership. Added classes of aliens were subjected to deportation in the Act of May 10, 1920 (41 Stat. 593) which authorized removal from the United States of those convicted of certain wartime offenses upon a *present finding* that the aliens were undesirable. *Mahler v. Eby*, 264 U. S. 32. Those convicted of Narcotic offenses were rendered deportable by the Act of May 26, 1922 (42 Stat. 596) and this act was interpreted administratively to apply only to those convicted after its enactment (Circular Letter No. 10, Immigration and Naturalization Service, July 28, 1936).

Sections 13 and 14 of the Immigration Act of 1924 provide for the deportation of those who enter the United States illegally or who overstay the period of their temporary admission (43 Stat. 162-163).

The Act of February 18, 1931 (46 Stat. 1171) enlarged the class deportable for narcotic convictions by expressly providing that the statute was applicable only to convictions "after the enactment of this Act."

Thus it will be seen, that prior to 1940, resident alien criminals, prostitutes, procurers and narcotic violators, were punished by deportation solely for present misconduct. And throughout the history of our Republic until 1940, past misconduct had never been utilized to render deportable legally resident aliens.

(D)

THE ALIEN REGISTRATION ACT OF 1940

Sections 20 and 21 of the Alien Registration Act of 1940 expanded the class of deportable aliens by including (54 Stat. 671-673): 1. Aliens who have assisted another alien to enter the United States unlawfully. 2. Aliens convicted of unlawfully possessing sawed-off shotguns. 3. Aliens convicted of violations of Title 1 of the Alien Registration Act. 4. Aliens convicted (even though not sentenced) because of violations of State or Federal Narcotic statutes including those regulating marihuana. By the express language of Section 22 of the Act, 54 Stat. 673), the foregoing provisions where made inapplicable to "any act committed prior to the date of the enactment of this Act." However, in the case of those deportable on subversive grounds, Section 23 of the Alien Registration Act expressly called for deportation on account of past membership (54 Stat. 673). The intent of the statute was expressed by Congressman Hobbs, one of its main proponents, as follows:

> "* * * after this bill becomes law it will be perfectly clear that any alien, * * * if at the time of his entry or at any time thereafter he has been, even for 1 minute a member of such an organization, he shall be deported." 86 *Cong. Rec.* 9032.

The statute, seeks to provide for the deportation of an alien "wholly without regard to the place, time, length, or character of his membership. It being the intent * * * that membership * * * at any time, of no matter how short duration or how far distant in the past, irrespective of its termination or of how it may have ceased, shall require deportation." (*House Report* 2683, *Senate Report* 1796, 76th Cong. 3rd Sess.; *Chafee, infra,* 445)

In his analysis of the statute, Professor Chafee remarks in *Free Speech in the United States* at p. 445:

> "The giving, lending, or promising of money for any doctrine or organization constitutes affiliation therewith. It matters not how distant the alien's sin, how complete his repentance, how great his present merits. Suppose an Italian was brought to this country as a child. In college in his ebullient youth he contributed two dollars to a Communist club, but decided not to join it. That was eight years ago. Now he is the conservative president of a bank, a pillar of society, married to an American woman and the father of four American citizens. Out he goes automatically—to Mussolini and a country where he knows nobody and whose language he has forgotten. * * * This banker is unpardonable along with prostitutes and cocaine addicts."

When Congress debated the bill which became the Alien Registration Act of 1940, provisions to forgive past membership, five years prior to the institution of deportation proceedings, were strenuously urged with considerable support but were ultimately defeated. 86 *Cong. Rec.* 10448. Congress was in no mood to forgive or to accept reasonable proposals with regard to deportation of aliens for past membership. Congressman Ford of California remarked during the debates:

> "The mood of the House is such that if you brought in the Ten Commandments today and asked for their repeal and attached to that request an alien law, you could get it." 84 *Cong. Rec.* 10370.

Section 22 of the Internal Security Act of 1950 (Public Law 831, 81st Cong. 2d Sess.; 64 Stat. —) continues the retroactive deportation provisions of the Alien Registration Act of 1940 and specifically designates membership or affiliation in the Communist or any totalitarian Party as

grounds for exclusion and deportation. And this provision has had the severest criticism from the President of the United States who said:

> "Moreover, the provisions of section 22 of this bill would strike a serious blow to our national security by taking away from the Government the power to grant asylum in this country to foreign diplomats who repudiate Communist imperialism and wish to escape its reprisals. It must be obvious to anyone that it is in our national interest to persuade people to renounce communism, and to encourage their defection from Communist forces. Many of these people are extremely valuable to our intelligence operations. Yet under this bill the Government would lose the limited authority it now has to offer asylum in our country as the great incentive for such defection. * * *
>
> Section 22 is so contrary to our national interests that it would actually put the Government into the business of thought control * * *. There should be no room in our laws for such hysterical provisions. * * *
>
> This illustrates the fundamental error of these immigration and naturalization provisions. It is easy to see that they are hasty and ill-considered. But far more significant—and far more dangerous—is their apparent underlying purpose. Instead of trying to encourage the free movement of people, subject to the real requirements of national security, these provisions attempt to bar movement to anyone who is, or once was, associated with ideas we dislike, and, in the process, they would succeed in barring many people whom it would be to our advantage to admit.
>
> Such an action would be a serious blow to our work for world peace." *House Document* 708, 81st Congress, 2d Sess., p. 9.

II

Deportation upon This Evidence Offends the Ex Post Facto Prohibition

Article 1, Section 9, containing limitations on the power of Congress provides in part: "No Bill of Attainder or ex post facto law shall be passed."

Under this provision of the constitution, it is clear that if the appellant committed a brutal assault upon a woman or child in the District of Columbia in 1929 and if three or five years thereafter prosecution were barred by the statute of limitations, Congress could not in 1940 revive this past misconduct and send him to jail. *Moore* v. *State*, 43 N.J.L. 203; *State* v. *Keith*, 63 N.C. 140 and see *Stewart* v. *Keyes*, 295 U. S. 403, 417. Here, it is sought not to jail appellant for alleged past misconduct, but to perpetually deprive him of his right to live with his wife and child in the United States and to send him into permanent exile for alleged past misconduct twenty years ago. Can such arbitrary and despotic application of our deportation laws be defended upon the ground that deportation is a civil proceeding?

1. *The 1940 Amendment operates retrospectively.* There can be no doubt, and the government admitted in the court below, that the law herein questioned is retroactive. Prior to 1940 only present membership in proscribed organizations furnished grounds for deportation. The law prior to 1940 was interpreted by Justice Roberts in *Kessler* v. *Strecker*, 307 U.S. 22 where he stated:

> "In the absence of a clear and definite expression, we are not at liberty to conclude that Congress intended that any alien, no matter how long a resident of this country, or however well disposed toward our government, must be deported, if at any time in the past, no matter when, or under what circumstances, or for what reason, he was a member of the described

organization. In the absence of such expression we conclude that it is the *present membership*, or *present affiliation*—a fact to be determined on evidence—which bars admission, bars naturalization, and requires deportation." (Italics supplied).

2. *The ex post facto prohibition forbids retroactive civil legislation.*

Some foreign countries, like Norway, Mexico, Portugal and Brazil, have express constitutional provisions forbidding all retroactive laws. (II *Dodd, Modern Constitutions*, 141, 42, 175; I *ibid*, 153). Article 43 of the 1921 Constitution of the Irish Free State—a provision reaffirmed in its 1937 Constitution—likewise prohibits retroactive civil and criminal legislation.

In ordinary usage among laymen and lawyers in English speaking countries, the accepted meaning of *ex post facto* encompasses civil as well as criminal matters. *Oxford Universal English Dictionary; Webster's New International Dictionary; Funk and Wagnalls New Standard Dictionary; Osborn, A Concise Law Dictionary for Students and Practitioners, (London); Byrnes, Law Dictionary; Aiyar, The Law-Lexicon of British India; Bell, South African Legal Dictionary; Black's Law Dictionary; Bouvier, Law Dictionary.*

At common law, in England and in this country, the phrase *ex post facto* was utilized to denote civil matters. *Wilkinson* v. *Meyer*, 2 Raymond 1350, 1352; *Sir Francis Bacon, Elements of the Common Law* (1639), *Maxim 21*, pp. 74, 78; 1 *Sheppard's Touchstone* 63, 70, 73; 1 *Cooley's Blackstone*, 4th Ed. pp. 682, 726. In the debates during the Constitutional Convention, George Mason remarked:

"* * * I conceive that, according to the common acceptation of the word, *ex post facto* laws and retrospective laws are synonymous terms." III *Elliot's Debates* 479.

Story on the Constitution (5th Ed) states at pp. 218-219:

> "The terms *ex post facto* laws, in a comprehensive sense, embrace all retrospective laws or laws governing or controlling past transactions, whether they are of a civil or criminal nature. And there have not been wanting learned minds, that have contended, with no small force of authority and reasoning, that such ought to be the interpretation of the terms in the Constitution of the United States. As an original question, the argument would be entitled to grave consideration * * *".

There is no decision of this court squarely holding that the *ex post facto* prohibition of the Constitution does not apply to the deportation process. There are Supreme Court *dicta* however which say that the *ex post facto* provisions are inapplicable on the ground that the prohibition applies only to criminal statutes. These *dicta* will be analyzed below. However, attention will first be directed to determine the validity of the basic proposition, commonly assumed without reflection, that the *ex post facto* prohibition relates only to criminal sanctions. It is submitted that such a doctrine is not supported by analysis of the relevant cases of this court.

Calder v. *Bull*, 3 Dall 386 (1798), was the first *ex post facto* decision of the Supreme Court. It upheld the right of the Connecticut legislature to set aside a court decree disallowing the probate of a will. The resolution of the legislature granted a new trial. In the course of its opinion the Supreme Court stated that the *ex post facto* prohibition was confined to criminal legislation. It may be noted that in 1798, it was assumed by the majority of the Court that a bill of attainder likewise applied only to criminal matters and that the two phrases, bill of attainder and *ex post facto*, enumerated criminal prohibitions exclusively.

Note Justice Johnson's remarks, at 2 Peters 686 and compare *Lovett* v. *United States*, 328 U.S. 303.

Samuel Corwin in his biography, *John Marshall and the Constitution*, describes Chief Justice Marshall's displeasure with the decision in *Calder* v. *Bull* and states at p. 150:

> "The decision roused sharp criticism and the judges themselves seem fairly to repent of it even in handing it down."

In *Fletcher* v. *Peck*, 6 Cranch 87 (1810) at 138-139, Chief Justice Marshall clearly indicated that he considered both the bill of attainder and *ex post facto* prohibition applicable to civil legislation. He there stated:

> "This rescinding act would have the effect of an *ex post facto* law. . . . This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant."

And, in a special appendix to *Satterlee* v. *Mathewson*, 2 Peters 414 (1829) at p. 681 (7 Law Ed. 561) Justice Johnson described the language in *Calder* v. *Bull* as *dicta* and devoted four pages to establish that the *ex post facto* prohibition applied to civil proceedings. He stated at page 682:

> "I then have a right to deny that the construction intimated by three judges in the case of Calder v. Bull is entitled to the weight of an adjudication. Nor is it immaterial to observe that an adjudication upon a fundamental law ought never to be irrevocably settled by a decision that is not necessary and explicit.
>
> * * * * * * *
>
> "That the phrase 'ex post facto' is not confined in its ordinary signification to criminal law or criminal statutes admits of positive demonstration."

Justice Johnson then traced the common law history of *ex post facto* and gave instances where at common law it had been used in connection with civil matters.

See also:

Ogden v. *Saunders,* 12 Wheat. 213, 286;
Dartmouth College v. *Woodward,* 4 Wheat. 518, 578, Note 7.

Writing in 15 *California Law Review* 269, 270 Prof. Breck McAllister of the University of Washington asserts:

> "Two writers after extensive examination of the records of the Constitutional Convention of 1787 and of the state ratifying conventions, have concluded that the phrase ex post facto was not used in the technical sense of a prohibition against criminal retroactive laws, but was intended to supplement the clause prohibiting the states from impairing the obligation of contracts, as a prohibition against all retroactive legislation. *The real mischief aimed at, it is pointed out, was retroactive civil legislation.*"

Prof. McAllister also advances the theory that *Calder* v. *Bull* incorrectly analyzed the problem because it was decided in 1798 and the records of the Constitutional Convention were not published until 1819. The two writings referred to by Prof. McAllister were articles by Prof. O. P. Field of the University of Indiana in 20 *Michigan Law Review* 315 (reprinted in 2 *Select Essays on the Constitutional Law* 1337) and by B. T. DeWitt in 15 *Political Science Quarterly* 96.

B. T. DeWitt in 15 *Political Science Quarterly* 96 at page 97 points out that:

> "It is equally manifest that the original intention of the convention in adopting Article 1, Section 9 that 'no bill of attainder or ex post facto law shall be passed' was to forbid the impairment of the obligations of contracts by national legislation."

And DeWitt further relates at page 103 that "Blackstone uses *ex post facto* more frequently of matters relating to property rights and civil proceedings than of matters relating to crimes and criminal proceedings" (Citing Cooley's Blackstone Volume 1, Book II, Ch. 20, pp. 682, 701, par. 308, 334; Ch. 22, p. 726, par. 368).

The real mischief in *ex post facto* legislation is the unfairness of its retroactive provisions. It is just as unfair to punish someone retrospectively and *nunc pro tunc* for past conduct criminally as it is to punish him under our civil laws. It is therefore not surprising that the Supreme Court itself declined to follow *Calder* v. *Bull* after the Civil War when three cases arose.

The first case was *Cummings* v. *Missouri*, 4 Wall 277, which involved a provision of the Missouri Constitution of 1865 to the effect that no person should practice as an attorney or clergyman unless he took a prescribed oath that he had not engaged in hostility against or been disloyal to the United States. Cummings was a Catholic priest who was convicted by the Missouri court of preaching without having taken the prescribed oath. The court specifically held that the requirement of a loyalty oath as to past conduct was *ex post facto* (4 Wall 326, 377) as well as a bill of attainder (4 Wall 323, 377). In so doing it specifically held that these constitutional provisions applied to civil proceedings (4 Wall 326, 327).

In the second case, *Ex Parte Garland*, 4 Wall 333, there was involved the constitutionality of a Federal statute which required an individual to swear as to his past loyalty in order to practice as an attorney in the Federal courts. Garland, a member of the Confederate Congress, applied to the Supreme Court for permission to continue to practice law without taking the oath. The Court held that this provision was unconstitutional both upon the ground that it was

a bill of attainder (4 Wall 377) and *ex post facto* (4 Wall 377, 378).

In both cases, dissenting opinions were recorded (4 Wall 333, 382) on the ground that under *Calder* v. *Bull ex post facto was confined to criminal proceedings* (4 Wall 390, 391).

In the third case, *Pierce* v. *Carskadon*, 16 Wall 234, 239, a statute required the taking of a loyalty oath to secure a rehearing in civil litigation. The Court relying upon the *Cummings* and *Garland* cases held the law unconstitutional.

There can be little doubt that these three court decisions which followed *Calder* v. *Bull* were square rulings inconsistent with the ruling in that early case. The *Cummings* and *Garland* cases, if recognized today, overrule the decision in *Calder* v. *Bull*. And, in *Lovett* v. *United States*, 328 U. S. 303 and *Garner* v. *Board of Public Works*, 341 U. S. 716, the most recent Supreme Court decisions on Article 1, Section 9(3) of the Constitution, this Court specifically acknowledged that the *Cummings* and *Garland* cases represented a correct statement of the law today. The *Lovett* case, it is true, dealt exclusively with bills of attainder, but significantly, the court held that the constitutional prohibition Article 1, Section 9(3) related to civil matters. A bill of attainder is a legislative act which inflicts punishment and it necessarily operates on past facts. For that reason the early cases like the *Cummings* and *Garland* cases made no distinction between *ex post facto* and *bills of attainder*. The reaffirmation of the *Cummings* and *Garland* cases in the *Lovett* and *Garner* cases, clearly indicates that the Supreme Court regards that both prohibitions relate to civil matters.

In 52 *Yale Law Journal* at page 116, 117, the Supreme Court authorities relied upon by appellee in the court below are analyzed. It will be observed that these authorities take the view that the *ex post facto* prohibition is confined to

criminal matters. It will further be observed that these authorities were *dicta* and unnecessary to the case holdings.

In *Johannessen* v. *United States*, 225 U. S. 227, denaturalization because of fraud and not deportation was involved. Taking something away from a man to which he was never entitled does not involve *ex post facto* legislation. In like manner, application of the 1917 Immigration Act to aliens who entered illegally prior to its effective date and who never had legal permanent residence, merely deprives them of something which they were never entitled to and is not *ex post facto*. *Lauria* v. *United States*, 271 Fed. 261, *cert. denied*, 257 U. S. 635; *U. S. ex rel. David* v. *Tod*, 289 Fed. 60; *Sit Sing Kum* v. *United States*, 277 Fed. 191; *Mon Singh* v. *White*, 274 Fed. 513; *Hughes* v. *Tropello*, 296 Fed. 306; *Ono* v. *United States*, 267 Fed. 359.

Bugajewitz v. *Adams*, 228 U. S. 585, involved deportation of an alien *presently* practicing prostitution. No *ex post facto* question was presented. In *Mahler* v. *Eby*, 264 U. S. 32, the case was remanded because the Secretary of Labor failed to make a finding that the alien was presently undesirable. Deportation of an alien held to be undesirable today involves no *ex post facto* feature.

It will be observed that in *Mahler* v. *Eby*, *supra*, both the court and the government relied upon *Hawker* v. *New York*, 170 U. S. 189 for the proposition that the statute did not contravene the *ex post facto* prohibition (Gov't brief p. 5). In addition, it may be noticed that counsel for the alien completely abandoned the argument that the statute was *ex post facto* in his brief before this court.

The *dicta* in the foregoing cases cannot be regarded as controlling. In reviewing these authorities 52 *Yale Law Journal* 116 concludes:

> "Although some cases have said that a criminal penalty must be involved, the weight of authority, relying on *Ex Parte Garland* and *Cummings* v. *Missouri*, has

asserted the more reasonable view that mere punishment of whatever nature is the criterion.''

3. *Deportation involves punishment within the ex post facto prohibition.*

Although it has frequently been stated that *ex post facto* relates solely to criminal matters, many of our leading writers on the subject recognize the inaccuracy of such statements.

Burdick, in *The Law of the American Constitution*, states at page 449:

> ''A statute may be ex post facto though not penal in form if its sole purpose is to inflict a penalty upon persons for past acts.''

1 *Cooley's Constitutional Limitations* (Eighth Ed.) 544-545 recognizes that:

> ''It is not essential however, in order to render a law invalid on these grounds, that it should expressly assume the action to which it relates to be criminal; or provide for punishment on that ground. * * * if it deprives a party of any valuable right—like the right to follow a lawful calling—for acts which were innocent, or at least not punishable by law when committed, the law will be ex post facto—in the constitutional sense, notwithstanding it does not in terms declare the acts to which the penalty is attached criminal.''

Rottschaefer, American Constitution Law, at 769, 770, declares:

> ''It has been stated that punishment also includes depriving one of his civil or political rights.''

In *Calder* v. *Bull*, *supra*, Justice Chase acknowledged that *ex post facto* encompassed legislative judgments which ''inflicted punishments, where the party was not by law,

liable to any punishment". And in footnote 3 of his opinion, he cited the banishments of Lord Clarendon and of the Bishop of Atterbury.

In *Cummings* v. *Missouri* and *Ex Parte Garland*, *supra*, the Supreme Court held the deprivation of the right to practice one's profession involved punishment. In the *Cummings* case, the court said that (4 Wall. 320-332, 324, 325):

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.
>
> . . . . . .
>
> " 'Some punishments', says Blackstone, 'consist of exile or banishment, by abjuration of the realm or transportation, others in loss of liberty. . . .'
>
> . . . . . .
>
> "The theory upon which our political institutions rest is that all men have certain inalienable rights—that among them are life, liberty and the pursuit of happiness. . . . Any deprivation or suspension of any of these rights for past misconduct is punishment, and can be in no otherwise defined.
>
> . . . . . .
>
> "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the right of the citizen should be secure against deprivation for past misconduct by legislative enactment, under any form however disguised."

In *Bridges* v. *Wixon*, 326 U. S. 135, Justice Douglas speaking for the majority stated:

> "It must be remembered that although deportation technically is not criminal punishment (*Johannessen* v. *United States*, 225 U. S. 227, 242; *Bugajewitz* v. *Adams*,

228 U. S. 585, 591; *Mahler* v. *Eby*, 264 U. S. 32, 39) it may nevertheless visit as a great a hardship as the deprivation of the right to pursue a vocation or a calling. Cf. *Cummings* v. *Missouri*, 4 Wall. 277; *Ex Parte Garland*, 4 Wall. 333. As stated by Justice Brandeis speaking for the Court in Ng Fung Ho v. White, 259 U. S. 276, 284, deportation may result in the loss 'of all that makes life worth living' ".

. . . . . .

"Here the liberty of an individual is at stake. . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. *That deportation is a penalty—at times a most serious one—cannot be doubted.*"

More recently in *Delgadillo* v. *Carmichael*, 332 U. S. 388, Justice Douglas stated that:

"Deportation can be the equivalent of banishment or exile. . . . The stakes are indeed high and momentous for the alien who has acquired residence here."

See also: *Fong Haw Tan* v. *Phelan*, 333 U. S. 10.

In *Ng Fung Ho* v. *White*, 259 U. S. 276, 285 Justice Brandeis said that deportation

"may result also in loss of both property and life; or of all that makes life worth living."

Wallis v. *Tecchio*, 65 F. (2d) 250, 252 (C.C.A. 5, 1933) states that:

"The statute in its effect upon the individual must be classified as penal. . . . We regard forfeiture for misconduct of the privilege of an existing residence in the United States as a penalty."

In *United States ex rel Klovis* v. *Davis*, 13 F. (2d) 630 (C.C.A. 2, 1926) it was again said:

> "However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to anyone."

In *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, Justice Jackson declared that:

> "A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."

And in the October, 1950 term of the Supreme Court, Chief Justice Vinson, speaking for the Court, stated in *Jordan* v. *DeGeorge*, 341 U.S. 223,

> "The Court has stated that deportation is a drastic measure and at times the equivalent of banishment or exile. . . . It is the forfeiture for misconduct of a residence in this country. Such forfeiture is a penalty. Fong Haw Tan v. Phelan 333 U.S. 6, 92 L. Ed. 433, 68 S. Ct. 374, supra."

Can there by any doubt that under the foregoing authorities the deportation of appellant who came here as a youth at the age of 16, would be a penalty and punishment? Would not plaintiff prefer being sent to jail for a year under *ex post facto* criminal legislation, rather than being punished *ex post facto* by perpetual exile from his family, his home, his job and the land where he has resided for over thirty years and to which he has been loyal for over twenty years? Of what value is it to surround appellant with constitutional guarantees of due process, if he may be summarily and arbitrarily deported under retrospective legislation?

4. *Deportation for innocent organization membership offends the ex post facto prohibition.* In *Garner* v. *Board of Public Works*, the majority as well as the minority of the court considered that an ordinance would be *ex post facto* if it required loss of municipal employment because of "past conduct lawful at the time it was engaged in." The majority found the ordinance constitutional on the assumption that it did not adversely affect "those persons who during their affiliation with a proscribed organization were innocent of its purpose, or those who severed their relations with any such organization when its character became apparent . . . ." Mere membership or affiliation did not create a knowing relationship in the *Garner* case.

The complaint herein specifically alleges that plaintiff was not aware of the aims of the subversive organizations of which he was a member, that he never advocated overthrow of the government and that when he became aware of the character of these organizations, he resigned. (Par. 10-15). The Board of Immigration Appeals in directing appellant's deportation, held in conformity with existing Department of Justice interpretation—an interpretation severely criticized by members of Congress—that unwitting membership was sufficient for deportation. (R. 17; Congressional Record January 2, 1951, pp. 17285, 17287). The Board held, by way of *dicta*, that mere membership, or mere attendance at meetings was sufficient without more to conclusively establish knowing membership. Perhaps, one might indulge in such presumptions with regard to Communist membership today. But, not in 1929! The naivete of the Board's remarks may be compared with the sober reflections of Professor Chafee in 1942 (Free Speech in the United States, p. 481):

> "The basic assumption of the framers of section 2 (a)(3) of the Alien Registration Act is, that 'Every-

one knows the Communist Party advocates force and violence.' Consequently, if any member who does not resign at once goes to prison later, it is his own fault. In other words, uneducated workmen like Boloff (State v. Boloff, 138 Ore. 568) know the answer to a question which has puzzled men of high intelligence ever since the Deportation Act of 1918. United States Circuit Judges and Cabinet officers could not agree about it in 1920. We have had two decades since then in which to make up our minds, and the problem is still unsolved * * *. When doctors disagree, how can a patient be expected to know poison when he sees it?"

In *Schneiderman* v. *United States*, 320 U.S. 118, this court was unable to determine whether the Communist Party advocated violent overthrow of the government. It was not until after 1945, after the cessation of hostilities and the violation of the Yalta and Potsdam agreements by Russia, our former ally, that the world and the United States became keenly alive to the dangers of Communism. And this court came thereafter to designate the Communist Party as subversive. *Dennis* v. *United States*, 341 U.S. 492; *American Communications Association* v. *Douds*, 339 U.S. 382, 391.

The views of those senators and representatives who managed the Internal Security Act of 1950 which reenacted and expanded the statute here under attack are expressed in the Congressional Record for January 2, 1951, at pp. 17285, 17288, 17289. Thus, Congressman Walter advised Attorney General McGrath as follows on November 17, 1950:

"The large group of us lawyers, entrusted with the drafting of this legislation, was fully familiar with the considerable volume of judicial and administrative interpretations of the existing immigration and naturalization laws, as they have accumulated—unchallenged—through the years. * * * The unchallenged interpretations referred to above, pertain both to the

definition of 'membership' and of 'affiliation'. To cite only a few of them:

In *Colyer* v. *Skeffington*, 265 Fed. 17, 72 (D. C. Mass.) the Court, in considering petitions for writs of habeas corpus of aliens held under warrants of arrest for deportation, made the following statement with respect to membership in an organization that advocates the overthrow of the Government of the United States by force or violence proscribed by the Act of October 16, 1918:

'I accord with what I understand now to be the view of the Department of Labor, that such membership must be real membership in or an actual affiliation with the proscribed organization * * *. Congress could not have intended to authorize the wholesale deportation of aliens, who accidentally, artificially, or unconsciously in appearance only, are found to be members of or affiliated with an organization of whose platform and purpose they have no real knowledge.' * * *

Mr. Attorney General, let me briefly recapitulate what is in our minds. It was, and it invariably remains, our intention to bar from admission and to eliminate from our midst the Communist subversive element, the active advocates of a totalitarian form of government. * * *''

Nevertheless, the statute herein, as construed and applied by defendant, requires deportation for innocent past membership in a proscribed organization. Such interpretation is in conflict with the ruling of this court in *Garner* v. *Board of Public Works, supra,* and in violation of the *ex post facto* prohibition of the Constitution. Appellant submits that he was never subject to deportation because his membership prior to his resignation in 1929 was innocent.

If the appellant was subject to deportation prior to 1929, either by reason of innocent membership or because his

membership was with *scienter*, then in 1930, he ceased to be deportable. *Kessler* v. *Strecker, supra.* Subsequent to 1930, appellant could become deportable for his past misconduct only by *ex post facto* legislation, prohibited by Article 1, Section 9 of the Constitution. *Moore* v. *State, State* v. *Keith, Stewart* v. *Keyes, supra.*

III

Appellant's Deportation Offends Due Process

The basic problem presented herein requires an adjustment of the conflict between the so-called plenary power of Congress to deport and the guarantees of due process accorded to resident aliens. Is an alien protected under the Constitution against an arbitrary deportation statute of Congress? Can Congress deport all blue-eyed aliens as suggested by Judge Swan in *U. S. ex rel Harisiades* v. *Shaughnessy*, 187 F. (2d) 137 (No. 43. October Term, 1951)? Is there no constitutional limit upon the deportation power of Congress as has been suggested by another court? *Prentis* v. *Manoogian*, 16 F. 2d 422, 423.

Is the statute, here under attack, directing *for past conduct* the deportation of a known and ascertainable group of legally resident aliens for the first time in our history, any different from a law which would direct the deportation of a named individual? And, are not the comments of Attorney General Jackson, which follow, equally applicable here?

> "If this bill were to become law it would be an historical departure from an unbroken American practice and tradition. It would be the first time that an Act of Congress has singled out a named individual for deportation. * * * And it would be the first time since the Alien and Sedition Laws a century and a half ago that any law would provide for a deportation with-

> out a hearing, or without, indeed, the slightest pretense toward giving the accused what our Nation has long know as 'due process of law'" (S. Rep. No. 2031, 76th Cong., 3rd Sess., p. 9).

Is an accused, given a hearing in conformity with what our Nation has long known, as due process of law, if the hearing is confined to establishing his identity as a blue-eyed alien or a past member of designated organizations? Does he have any real opportunity to defend himself and does he really have due process?

Is a resident alien merely entitled to procedural due process without any right to attack an arbitrary deportation statute as a matter of substantive due process? Is a resident alien guaranteed procedural and substantive due process with relation to all statutes except a deportation statute?

The power of Congress to provide, on any grounds it sees fit, for the expulsion even of aliens with an established domicile here, was asserted in sweeping terms in 1895. *Fong Yue Ting* v. *United States*, 149 U. S. 498. But even at the moment of decision, three members of the Court—Chief Justice Fuller, Justices Brewer and Field—dissented profoundly. Said the Chief Justice (p. 763):

> ". . . it contains within it the germs of the assertion of an unlimited and arbitrary power, in general, incompatible with the immutable principles of justice, inconsistent with the nature of our government, and in conflict with the written Constitution by which that government was created and those principles secured."

Eight years later, in the *Japanese Immigrant* case, 189 U. S. 86, 100, this Court rejected the full sweep of Fong Yue Ting. Mr. Justice Harlan for the Court, overruling government contentions strikingly similar to those advanced here, said:

> "But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."

That the fundamental principles of procedural due process have full rein in deportation has since become settled doctrine, notwithstanding the plenary power of Congress to deport aliens. *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 335. Rejection of the Government's argument of "plenary power" in the *Japanese Immigrant* Case, some fifty odd years ago, has left the Republic unshaken.

The Fifth Amendment embodies substantive, as well as procedural guarantees,—and these, "to any person."

The Government in the *Harisiades* case, in its brief opposing *certiorari* in this Court, suggests at page 10 that the power to deport involves a legislative judgment on matters affecting public welfare and therefore "it would seem that the standard governing the power of Congress is that its judgment rest on a rational basis". Is there a rational basis for the legislative judgment that past membership twenty years removed, regardless of subsequent loyalty to our institutions, renders an alien an undesirable resident today?

We understand that when the President recently advised Congress: "It must be obvious to anyone that it is in our national interest to persuade people to renounce communism and to encourage their defection from Communist forces" (House Document 708, *supra.*), he did so, after full consultation with the Federal Bureau of Investigation and the State Department. There is no basis in the "real requirements of national security" for believing that an alien who has been loyal to the United States for twenty years, is now suddenly undesirable. Apparently, the views

of the Department of Justice do not coincide with those of the President. Moreover, the same Congress which in June of 1940 decreed that past membership *twenty years removed and more* rendered an alien an undesirable resident, forgave in October, 1940 aliens with past membership *ten years* removed and considered them desirable residents, eligible for the great privilege of American citizenship. (Section 305-d of the Nationality Act of 1940, 54 Stat. 1141; 8 U. S. C. 705-c, after enactment of the Internal Security Act of 1950). Can the rationale of these two inconsistent legislative judgments of the same Congress be upheld? We submit that a classification of conclusive undesirability because of membership twenty years ago, is just as irrational as a conclusive presumption that a gift *inter vivos* six years before death was necessarily made in contemplation of death. *Schlessinger* v. *Wisconsin*, 270 U. S. 230. Constitutional guarantees may not be made to yield to mere convenience, and arbitrary classifications of this character violate due process. See also: *Weaver* v. *Palmer Bros.*, 270 U. S. 402.

Appellant asserts that he never personally believed in the principles of the Communist Party nor in the overthrow of the government. He is being deported solely and purely because of past association, over twenty years ago, with a proscribed organization, regardless of his knowledge of its aims or purposes. In condemning this as violative of the Constitution, Justice Murphy in *Bridges* v. *Wixon*, 326 U.S. 135 stated:

> The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law. *Schneiderman v. United States*, 320 U.S. 118, 154. It prevents the persecution of the innocent for the beliefs and actions of others. See

Chafee, Free Speech in the United States (1941), pp. 472-475.

"Yet the deportation statute on its face and in its present application flatly disregards this rule. It condemns an alien to exile for beliefs and teachings to which he may not personally subscribe and of which he may not even be aware. This fact alone is enough to invalidate the legislation. Cf. DeJong v. Oregon, 299 U.S. 353; Herndon v. Lowry, 301 U.S. 242; Whitney v. California, 274 U.S. 357."

See also: *DeJonge* v. *Oregon*, 299 U.S. 353; 52 *Yale Law Journal*, 108,. 114.

Compare, the President's Loyalty Program and its designation of subversive organizations. The rules of the Civil Service Commission prescribe:

"In connection with the designation of these organizations, the Attorney General has pointed out, as the President had done previously, that it is entirely possible that many persons belonging to such organizations may be loyal to the United States; that membership in, affiliation with, or sympathetic association with, any organization is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. 'Guilt by association' has never been one of the principles of our American jurisprudence. We must be satisfied that reasonable grounds exist for concluding that an individual is disloyal. That must be the guide." 5 *Code of Federal Regulations* 210.15 p. 200 (1949 ed.)

Yet for the alien, who faces loss of liberty and all that makes life worth living, instead of loss of a government job, past associations of more than twenty years ago, which have no reasonable relation to our present internal security or to moral worth or desirability today are not simply "one piece of evidence" but a conclusive presumption of guilt

by association. Such arbitrary application of the statute to appellant, offends due process.

IV

Appellant's Deportation Offends the First Amendment

If the statute, as applied to appellant, had a reasonable relationship to the power of Congress to expel undesirable aliens, the protection of the First Amendment would afford no relief to him. But deportation of an alien for innocent and unwitting associations, twenty years removed, presents no present dangers requiring curtailment of rights protected by the First Amendment.

The power of Congress to deport stands in no different setting, in relation to the First Amendment, than the police power—a problem which has faced this court frequently. "Adjustment of the inevitable conflict between free speech and other interests is a problem as persistent as it is perplexing." Justice Frankfurter, *Niemotko* v. *Maryland,* 340 U.S. 268. "Freedom of speech and of press is accorded aliens residing in this country. *Bridges* v. *California,* 314 U.S. 252 . . ." Justice Douglas, *Bridges* v. *Wixon,* 326 U.S. 135, 148.

Appellant asserts that in innocently convening twenty years ago with members of organizations now deemed subversive, he merely exercised his rights of free speech and assemblage. Since his association as alleged in the complaint was for lawful purposes and presented no clear and present danger *Schenck* v. *United States,* 249 U.S. 47 and did not constitute a conspiracy participated in by appellant to overthrow the government as speedily as circumstances would permit *Dennis* v. *United States,* 341 U.S. 492, these rights were protected by the First Amendment. In the *Bridges* case, Justice Murphy stated:

"As shown by the record in this case, Harry Bridges has done no more than exercise his personal right to free speech and association. Yet upon proof of that fact, he would be subject to deportation under the statute. The invalidity of legislation of such nature is inescapable."

See also: 52 *Yale Law Journal* 108, 115

Conclusion

Whether the power to deport originates in the international law concept of sovereignty or stems from Congressional power to regulate foreign commerce, it is subject to constitutional restrictions and it must be confined within limits of reasonableness. "Arbitrary and tyrannical power has no place in our system". (Justice Field, dissenting in *Fong Yue Ting* v. *United States*, *supra*.) In his discussion of Title I of the Alien Registration Act of 1940, Chief Justice Vinson, recently said in *Stack* v. *Boyle*, No. 400, October 1951 Term, 20 L.W. 4004, that we should not "inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute". And President Truman, discussing past membership in subversive organizations, has warned us against establishing "for ourselves an 'iron curtain' against those who can help us in the fight for freedom". (*House Document 708, supra*, p. 10.)

We can conceive of no more arbitrary, unreasonable, and tyrannical power, than that which seeks in 1950 under a 1940 statute to separate from his family and banish a resident alien, loyal to our institutions for twenty years, because of organizational activity in 1929. No requirement of security necessitates perpetual exile for this man who has lived here since his early youth and for thirty years. No rational basis other than the despotism of hysteria exists for appellant's expulsion. We submit that

the proposed deportation of appellant is inconsistent with the nature of our government and that the statute as construed and applied to him is in conflict with the Constitution.

Respectfully submitted,

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(8306)

STATE-MENT AS TO JURIS-DICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 264

DORA COLEMAN,

Appellant,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT AS TO JURISDICTION

DAVID REIN,
Counsel for Appellant.

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U. S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1951

Civil Action No. 5141-50

DORA COLEMAN,

Plaintiff,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, Dora Coleman, plaintiff in the above-entitled cause, submits herewith her statement showing the basis of the jurisdiction of the Supreme Court upon appeal to review the judgment of the District Court.

This is an action brought by the plaintiff in the United States District Court for the District of Columbia to enjoin the Attorney General and the Acting Commission of Immigration and Naturalization from deporting the plaintiff pursuant to a deportation order which was obtained on the basis of the Act of October 16, 1918 as amended by the Act of June 28, 1940, 8 U.S.C. #137. The complaint alleged, among other grounds, that the foregoing statute was un-

constitutional on its face and as applied to the plaintiff. The complaint requested both a preliminary and a permanent injunction.

A statutory three-judge court was convened pursuant to 28 U.S.C. sec. 2282. The case was consolidated for purpose of hearing with the companion case of *Mascitti* v. *McGrath*, Civil Action No. 5148-50, in which the plaintiff challenged the constitutionality of the same statute and sought the same relief as the plaintiff herein.

On March 20, 1951, the Court entered an order in both of these cases finding that the statute challenged by the plaintiffs was constitutional, and on that ground denied the plaintiffs' motions for a preliminary injunction. In the same order the Court dissolved the three-judge court and remanded the case to United States District Judge Curran for the determination of other questions.

Thereafter the Court, on June 18, 1951, vacated and set aside its order of March 20, 1951 and reconvened the three-judge court. In the same order, the Court denied the plaintiff's motion for a preliminary injunction, dismissed the complaint, entered judgment for the defendants and again dissolved the three-judge court.

Statutory Provision Sustaining Jurisdiction

The jurisdiction of the Supreme Court rests on 28 U.S.C. sec. 1253, which provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit, or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Statute Involved

Prior to 1940, the Act of October 16, 1918 (8 U.S.C. 137) provided *inter alia* for the exclusion and deportation of aliens who were currently members of organizations advocating or distributing literature advocating the overthrow of the government by force and violence. *Kessler* v. *Strecker*, 307 U. S. 22.

Section 23 (b) of the Alien Registration Act of 1940 (54 Stat. 673) amended Section 2 of the Act of October 16, 1918 (40 Stat. 1012, 41 Stat. 1008; 8 U.S.C. 137) to read as follows:

> Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in Section 1 of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported. . . . The provisions of this section shall be applicable to the classes of aliens mentioned in this act, irrespective of the time of their entry into the United States.

Date of Judgment and of Petition for Appeal

Plaintiff seeks review of the order of the District Court entered on June 18, 1951, denying plaintiff's action for a preliminary injunction, dismissing the complaint and entering judgment for the defendants.

The petition for allowance of appeal is presented on July 30, 1951.

Opinion of the Court

The Court entered no opinion in this case. On March 20, 1951, it entered an order, annexed as Appendix A, in which it stated its conclusion that the Act of October 16, 1918, as amended by the Act of June 28, 1940 is constitutional, and denied the plaintiff's motion for a preliminary injunction. Subsequently on June 18, 1951 it entered another order,

annexed hereto as Appendix B, in which it reaffirmed its finding that the aforesaid act was constitutional, denied the plaintiff's motion for a preliminary injunction, dismissed the complaint and entered judgment for the defendants.

Substantial Nature of the Questions Involved

A. *Statement*

The facts alleged in plaintiff's complaint and as shown by her Immigration file which was made a part of the record are undisputed. These show the following: The plaintiff is an alien who was lawfully admitted to the United States for permanent residence on March 6, 1914. She has continuously resided in the United States since that date. She is married to a citizen and resident of the United States and is the mother of three children, born and residing in and citizens of the United States.

On May 2, 1950, the plaintiff was ordered deported pursuant to the provisions of 8 U.S. Code sec. 137(g) as amended on June 28, 1940, for past membership in an organization which was found by the Immigration Service to believe in, advise, advocate and teach the overthrow by force and violence of the Government of the United States, and to circulate, distribute, and display written and printed matter so advocating and teaching. Plaintiff's membership in this proscribed organization ceased in 1938, approximately two years before the enactment of the statute under which it is sought to deport her. No contention is made that the plaintiff herself at any time advocated the overthrow of the government of the United States, or ever distributed literature so advocating, by force or violence or by any other means. Nor were there any findings that the plaintiff at any time participated in or had knowledge of the proscribed purposes of the organization.

Thus the deportation order rests solely on a finding of mere past membership in a proscribed organization, which membership ended two years before the enactment of the statute authorizing deportation on such ground and twelve years before the order of deportation.

A warrant of arrest for the plaintiff was issued by the Immigration and Naturalization Service on April 12, 1946, and was served on the plaintiff on May 10, 1946. The hearings upon which the deportation order was rested was held on July 26 and 27, 1949, and the charges upon which the order is based was not lodged against the plaintiff until the second day of this hearing July 27, 1949.

The complaint alleged that the statute on its face and as construed and applied in this case is unconstitutional as in conflict with Article I, Section 9, and the First and Fifth Amendments. It further alleged that the proceedings themselves were in violation of due process of law, and were not in conformance with the Administrative Procedure Act, 5 U. S. C. #1001, et seq.

In its order dismissing the complaint, entering judgment for the defendants, and denying the plaintiff's motion for a preliminary injunction, the three-judge statutory court specifically found that the challenged statute was constitutional.

B. *History of the Statute Before the Supreme Court*

The statute here challenged has been before the Supreme Court once before in the case of *Bridges* v. *Wixon*, 326 U. S. 134. The Court in that case, reversing the deportation order appealed from, on grounds other than the unconstitutionality of the statute involved, found it "unnecessary for us to consider the larger constitutional questions which have been advanced" at pp. 156-157. Justice Murphy concurring specifically held the statute to be unconstitutional, setting

out his reasons for so holding at some length at pp. 160-166.

Thus, since one Justice considered the statute here involved to be unconstitutional, and the majority of the Court in its opinion clearly indicated that it considered the question of the constitutionality of the statute to be substantial, there can be no doubt that a substantial question is presented by this appeal. This conclusion is fortified by a scholarly note written on the *Bridges* case prior to the Supreme Court opinion. This note, 52 Yale L. J. 108, after carefully reviewing all the authorities came to the opinion that the statute was unconstitutional.

C. *The Applicability of the ex post facto Clause of the Constitution to Deportation Laws*

Even apart from the history of this particular statute before the Supreme Court the present state of the authorities indicates the substantial nature of the plaintiff's contentions urging that the statute is unconstitutional. Foremost among these is the applicability of the *ex post facto* clause of the Constitution, Article I, Section 9 to deportation statutes.

The plaintiff contends that the statute under which it is sought to deport the plaintiff is, as applied to the facts of this case, an *ex post facto* law in violation of Section 9 of Article I of the Constitution. The government, however, although conceding the retroactive aspect of the statute, contends that the *ex post facto* prohibition of the Constitution does not apply to deportation statutes.

The scope of the *ex post facto* provision is defined by the cases of *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 33; *Pierce* v. *Carskadon*, 16 Wall. 234; *Burgess* v. *Salmon*, 97 U. S. 381. These cases all hold that the application of the *ex post facto* provision of the Constitution is not limited to strictly criminal proceedings, but applies to

civil proceedings as well if some punishment or penalty is involved. Thus the test for the applicability of the *ex post facto* provision is whether or not the statute challenged imposes punishment. See 52 Yale L. J. 108, 116.

Earlier cases in the Supreme Court contain dicta to the effect that deportation statutes do not come within the scope of the *ex post facto* provision of the Constitution, since deportation is neither a punishment nor a penalty. *Bugajewitz* v. *Adams*, 228 U. S. 585; *Mahler* v. *Eby*, 264 U. S. 32.

But the dicta in these cases has been effectively repudiated by later opinions of the Supreme Court. Thus the Court said in *Ng Fung Ho* v. *White*, 259 U. S. 276, 284 that deportation may result in the loss "of all that makes life worth living"; in *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391; "Deportation can be the equivalent of banishment or exile"; in *Fong Hon Tan* v. *Phelan*, 333 U. S. 6, 10; ". . . deportation is a drastic measure and at times the equivalent of banishment or exile . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty"; and most recently in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50: "A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."

For similar expressions by Circuit Courts of Appeals see *United States ex rel. Klovis* v. *Dale*, 13 F. (2d) 630: "However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to anyone"; *Wallis* v. *Tecchio*, 65 F. (2d) 250, 252: "The statute in its effect upon the individual must be classified as penal. . . . We regard forfeiture for misconduct of the privileges of an existing residence in the United States as a penalty,"

and *DiPasquale* v. *Karmuth*, 158 F. (2d) 878, 879: "Caprice in the incidence of punishment is one of the indicia of tyranny, and nothing can be more disingenuous than to say that deportation in these circumstances is not punishment."

In *Bridges* v. *Wixon*, 326 U. S. 134, the Court at p. 147 spoke directly on the question of the applicability of the *ex post facto* provision of the Constitution to deportation situations:

> In that connection, it must be remembered that although deportation *technically is not criminal punishment* [citing *Bugajewitz* v. *Adams* and *Mahler* v. *Eby*, *supra*, (emphasis supplied)], it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling [citing *Cummings* v. *Missouri*, and *Ex parte Garland*, both of which involved the application of the *ex post facto* provision of the Constitution].

Thus the Court limited the effect of earlier dicta to the pronouncement that deportation statutes are not *criminal* statutes, but clearly indicated that despite that, deportation is punishment within the scope of the *ex post facto* provision.

And in the latest Supreme Court case which considered the nature of deportation statutes, the Court specifically declared that deportation statutes, although not strictly criminal, must nevertheless meet the same constitutional standards as criminal statutes, *Jordan* v. *DeGeorge*, 341 U. S. 223.

Thus it is clear that the dicta of the earlier cases in the Supreme Court have by now been specifically repudiated by the Court. Even if one refuses to concede the conclusive nature of the Supreme Court's latest pronouncements on the question, the most that can be said is that the question is in doubt and requires definitive resolution by the Supreme Court.

D. *The Applicability of the Constitution to Deportation Proceedings*

The government contends that the power to deport is plenary, and that this power, unlike any other power, granted to the federal government by the Constitution, is not subject to the Bill of Rights. Despite the support that might be found for this doctrine in earlier dicta of the Supreme Court, this proposition can no longer be considered to be a tenable one. The government places its chief reliance on *Fong Yue Ting v. United States*, 149 U. S. 698 decided in 1892. But that case can no longer be considered to be authoritative. It was decided prior to the cases holding that resident aliens must be afforded due process of law in deportation proceedings, and the case squarely holds that no distinction can be made between expulsion and deportation proceedings. Indeed, the case upheld the validity of a statute which quite clearly denied the alien any semblance of due process, a statute which could never pass the test of subsequent Supreme Court decisions.

Recognizing the force of later Supreme Court decisions, the *Japanese Immigrant* Cases, 189 U. S. 86; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49-51; the government concedes that the Constitution requires due process of law in deportation proceedings. It argues, however, that even though this provision of the Constitution applies to deportation proceedings, other constitutional provisions do not. Indeed its argument goes even further. For although admitting that the due process provision of the Fifth Amendment applies to deportation proceedings, it argues that it applies only so far as it affects procedural due process, but that insofar as it constitutes a check on unreasonable or irrational legislation, it does not. Obviously this argument is completely without logic. There is no basis for urging that one provision of the Bill of Rights applies to deporta-

tion procedings, but other provisions do not. It is even more absurd to argue as does the government, that one particular clause of the Fifth Amendment applies, but only partially so.

This irrational position was clearly rejected by the Supreme Court in the *Bridges* case, where the Court said at pp. 147-148:

> In that connection, it must be remembered that although deportation technically is not criminal punishment . . . , it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling. . . . As stated by Mr. Justice Brandeis speaking for the Court in *Ng Fung Ho.* v. *White*, 259 U. S. 276, 284, deportation may result in the loss "of all that makes life worth living".
>
> We cannot assume that Congress meant to employ the term "affiliation" in a broad, fluid sense which would visit such hardship on an alien for slight or insubstantial reasons. It is clear that Congress desired to have the country rid of those aliens who embraced the political faith of force and violence. But we cannot believe that Congress intended to cast so wide a net as to reach those whose ideas and program, though coinciding with the legitimate aims of such groups, nevertheless fall far short of overthrowing the government by force and violence. Freedom of speech and of press is accorded aliens residing in this country. *Bridges* v. *California*, 314 U. S. 252. So far as this record shows the literature published by Harry Bridges, the utterances made by him were entitled to that protection.

Thus, the Court clearly indicated that to deport Bridges solely on the basis of constitutionally protected speech and publication would be in conflict with the Constitution. Any other conclusion would be clearly absurd. For the government would argue that a resident alien enjoys the constitutional rights of free speech and free press except that he

can be deported for the exercise of these rights. Finally, to accept the government's position that aliens may be deported for any or no reason, would mean to hold that the government could deport aliens solely on the ground that they were Catholics or Jews. Obviously this is not and cannot be sound doctrine, and the power to deport is subject to the Constitution to the same degree as any other power granted to the government by the Constitution.

In essence, the government's contention is that aside from the requirement of a due process hearing, resident aliens in deportation proceedings stand on the same footing as aliens not in this country who are seeking entrance into this country. *Knauff* v. *Shaughnessy*, 338 U. S. 538. According to the government they have no rights and can raise no constitutional questions. This argument was effectively repudiated by the Supreme Court in the case of *Jordan* v. *De George*, *supra*, which held that deportation statutes are to be submitted to the same constitutional standards as criminal statutes.

E. *The Present Statute as Applied to the Plaintiff is in conflict with the First and Fifth Amendments*

Once it is resolved that the protections of the Constitution are available to aliens in deportation proceedings, there is more than ample authority to demonstrate the unconstitutionality of the present statute as applied.

Thus, the statute by making deportation rest upon mere membership in a proscribed organization without proof of participation in or knowledge of the proscribed activities is an application of the unconstitutional doctrine of guilt by association in violation of the First and Fifth Amendments. *Schneiderman* v. *United States*, 320 U. S. 118; *Bridges* v. *Wixon*, 326 U. S. 135; *DeJonge* v. *Oregon*, 299 U. S. 353; *Kotteakos* v. *United States*, 328 U. S. 750, 772, *Memorial of*

the Special Committee Appointed by the Association of the Bar of the City of New York, New York Legislative Documents, Vol. 5, 143rd Session (1920) No. 30, p. 4; O'Brien, *Loyalty Tests and Guilt by Association,* 61 Harv. L. Rev. 592.

In addition, deportation resting solely on mere past membership in a proscribed organization cannot be justified under the clear and present danger doctrine. *Bridges* v. *California,* 314 U. S. 252; *Terminiello* v. *City of Chicago,* 337 U. S. 1; *Herndon* v. *Lowry,* 301 U. S. 242; *DeJonge* v. *Oregon,* 299 U. S. 253. Obviously, under these circumstances, the continued presence of the plaintiff in this country cannot constitute any clear and present danger of any substantive evil which Congress has a right to prevent.

In fact her continued presence in this country creates no kind of danger or problem to this country. Nor is there any warrant on the basis of the findings made pursuant to statute to argue that she is an undesirable alien. Consequently, the order of deportation bears no reasonable relationship to the purpose for which governmental power to deport exists, i.e. to expel undesirable aliens from the country. See *Mahler,* v. *Eby,* 264 U. S. 32, 39. *DeJonge* v. *Oregon,* 299 U. S. 353; *Cummings* v. *Missouri,* 4 Wall 777; *A. C. A.* v. *Douds,* 339 U. S. 382. This is further shown by the statement of the proponent of the 1940 amendment to the law permitting deportation for past membership. He said:

> • • • after this bill becomes law it will be perfectly clear that any alien • • • if at the time of his entry or at any time thereafter he had been, even for one minute a member of such an organization, he shall be deported (86 Cong. Rec. 9032).

In the present case, plaintiff's membership in the proscribed organization terminated more than ten years prior

to the order of deportation. That an order of deportation on such ground bears no reasonable relation to the power to rid the country of undesirable aliens is shown by 8 U.S.C.A. #705 which states that membership in a proscribed organization shall not be a bar to naturalization if such membership has ceased more than ten years ago. *United States* v. *Waskowski*, 158 F. (2d) 962.

Finally, under the doctrine of *Garner* v. *Los Angeles*, 341 U. S. 716, any punishment visited upon an individual for past membership in a proscribed organization where the individual was innocent of the proscribed purposes of the organization would run afoul of the constitution. The present statute as interpreted and applied in this proceeding by the defendants and by the three-judge statutory court makes knowledge of the proscribed purposes of the organization immaterial, and visits the penalty of deportation on the basis of mere past membership in the organization, even though the plaintiff was entirely innocent of the proscribed purposes of the organization. The statute also applied is clearly unconstitutional under the doctrine of the Supreme Court.

F. *The Proceedings failed to conform with the requirements of the Administrative Procedure Act*

The government conceded that the proceedings failed to conform with the requirements of the Administrative Procedure Act. Nor did it dispute that this Act was applicable to deportation proceedings as of the date when the hearings in this case were held. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33.

The government argued however that the case is governed by Section 12 of the Administrative Procedure Act, 5 U.S.C. 1011 which provides that "no procedural requirement shall be mandatory as to any agency proceeding

initiated prior to the effective date of such requirement." But this section does not apply to the present proceedings which were initiated after the effective date of the Act.

The purpose of Section 12 of the Administrative Procedure Act, according to the report of the Senate Judiciary Committee, was to postpone the effective date of the Act "for periods of time sufficient to afford agencies ample opportunity to revise their practices as required". Senate Document No. 248, 79th Cong., 2d Sess., p. 43.

The government argued that although the hearings in this case were not held until July 26 and 27, 1949, some three years after the Administrative Procedure Act was enacted, the proceedings were neverthelss initiated by a warrant of arrest issued on April 22, 1946, more than three years before the hearing. But it is obvious that the provisions of Section 12 are not open to such a construction. It obviously meant to cover only proceedings either already under way or at least calendared at the time of the Act; so that the provisions of the Act would not result in interrupting or delaying proceedings already begun. But it is obvious in this case that the Immigration Service had ample time to conform to the procedure of the Act in the three years intervening between the passage of the Act and the date the hearings were held. It is perfectly obvious that so far as Section 12 is concerned, the present proceedings were initiated when the hearings were held or at the latest when the case was first set for hearing. This conclusion becomes inescapable when it is realized that the findings upon which the deportation order rests were made not on the basis of the charge lodged in the warrant of arrest, but on the basis of charges lodged only on the second day of the hearing. (See Tr. 173-174).

The construction of Section 12 urged by the Immigration Service is that a proceeding is initiated by a warrant of

arrest which contains charges never acted on, and even though a hearing on different charges were held, some ten to twelve years later. Since the only purpose of Section 12, was to afford agencies affected, "ample opportunity to revise their practices as required", the interpretation suggested by the Service is hardly warranted.

Further it is evident that this view of the Service was not the view it took at the time of the hearings. At the hearing itself, when objection was taken to the failure to conform to the provisions of the Administrative Procedure Act, the presiding inspector overruled the objection on the ground that the Act did not apply to the Immigration Service, not on the ground that the instant proceedings had been initiated before its effective date (Tr. 167). Further when the Service finally bowed to the Supreme Court decision in the Wong Yang Sung case, it issued regulations to make all its future hearings conform with the Administrative Procedure Act, making no distinction between cases where the warrant of arrest was issued before the effective date of the Act, and cases where the warrant of arrest was issued after the effective date. *Marsh et al.* v. *Barber*, 181 F. (2d) 492.

G. *The proceedings failed to conform with the requirements of due process of law.*

The failure to conform with the requirements of the Administrative Procedure Act amounted to a denial of a fair hearing, and a deprivation of due process of law. See *Wong Yang Sung* v. *McGrath, supra,* where the Court said at p. 50-51:

> Indeed, to so construe the Immigration Act [so that the Administrative Procedure Act did not apply to proceedings thereunder] might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing

> standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.

The government argued that this quotation is dicta unnecessary to the holding of the Court. But its logic and reasoning is unassailable. Nor is there any force to the the further contention of the government that Congress' later declaration that aliens should not be accorded hearings in deportation proceedings in accordance with "currently prevailing standards of impartiality", somehow alters the situation. For, obviously Congress cannot by statute abolish a constitutional requirement. And it should be recalled that the requirement that aliens be accorded due process of law in deportation hearings was in the first place imposed by the Constitution and the Supreme Court over the objection of both Congress and the Immigration Service. See *Japanese Immigrant Cases, supra.*

This conclusion is even more evident when it is realized that one of the procedural requirements of the Administrative Procedure Act from which deportation proceedings are exempted by subsequent Congressional legislation is the requirement that aliens be given prior and timely notice of the issues involved. 5 U.S.C. #1004(a). Entirely independently of the Administrative Procedure Act, this is a requirement imposed upon administrative agency hearings by the due process clause of the Constitution. *Morgan* v. *United States,* 304 U.S. 1. The present proceeding failed to conform with this requirement. In fact, the deportation order was issued upon the basis of charges made only after the conclusion of the hearing.

Conclusion

This appeal is within the exclusive jurisdiction of the Supreme Court and presents substantial questions of the greatest importance requiring review of the order of the three-judge court.

Respectfully submitted,

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APPENDIX "A"

Filed Mar. 20, 1951. Harry M. Hull, Clerk.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5141-50

DORA COLEMAN, *Plaintiff*,

v.

J. HOWARD MCGRATH, Attorney General of the United States, et al., *Defendants*.

ORDER

This case came on to be heard before a three-judge statutory court on the motion of the plaintiff for a preliminary injunction and a motion of the defendant for summary judgment or to dismiss the complaint; and the court having determined that the Act of October 16, 1918, as amended by the Act of June 28, 1940, is constitutional, it is

ORDERED, that the motion for a preliminary injunction is hereby denied; that the three-judge court be dissolved; and that the case be remanded to United States District Judge Curran for the determination of the other questions.

(S.) JAMES M. PROCTOR,
United States Circuit Judge.

(S.) ALEXANDER HOLTZOFF,
United States District Judge.

(S.) EDWARD M. CURRAN,
United States District Judge.

March 20, 1951.

APPENDIX "B"

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5141-50

DORA COLEMAN, *Plaintiff*,

v.

J. HOWARD MCGRATH, Attorney General of the United States, *Defendant*

AMENDED ORDER

This case came on to be heard before a three-judge statutory court on the motion of the plaintiff for a preliminary injunction, and a motion of the defendant for summary judgment, or to dismiss the complaint; and the court having determined that the Act of October 16, 1918, as amended by the Act of June 28, 1940, is constitutional; and the court having denied the motion for preliminary injunction, and having dissolved the three-judge court, and having remanded the case to United States District Judge Curran for the determination of the other questions, it is NOW ORDERED,

That the original order be vacated and set aside, and the three-judge court be reconvened; and it is FURTHER ORDERED,

That the motion for a preliminary injunction is hereby denied; that the motion of the defendant to dismiss the complaint is granted; and judgment is entered for the defendant; and the three-judge court is now dissolved.

(S.) JAMES M. PROCTOR,
United States Circuit Judge.

(S.) ALEXANDER HOLTZOFF,
United States District Judge.

(S.) EDWARD M. CURRAN,
United States District Judge.

June 18, 1951.